

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 18-0390

LISA ROBERTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/30/2019
	)	
DEPARTMENT OF ARMY/NAF	)	
	)	
Self-Insured	)	
Employer-Respondents	)	DECISION and ORDER

Appeal of the Attorney Fee Order of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal) and Steven M. Birnbaum (Law Office of Steven M. Birnbaum, PC), San Rafael, California, for claimant.

Raymond H. Warns, Jr. (Holmes, Weddle & Barcott, P.C.), Seattle, Washington, for self-insured employer.

Before: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order (2016-LHC-00705, 2016-LHC-01224) of Administrative Law Judge Richard M. Clark rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

The administrative law judge awarded claimant ongoing temporary total disability benefits from August 18, 2016, and medical benefits for her work-related injuries. Claimant's counsel requested an attorney's fee totaling \$74,489.50, representing 104.65 hours of attorney time at an hourly rate of \$525, 65.35 hours of law clerk time at an hourly rate of \$195, and \$6,805 in costs for work before the administrative law judge. Employer filed objections to counsel's fee petition, and claimant's counsel filed a reply. In his Attorney Fee Order, the administrative law judge reduced the requested hourly rates, number of hours and costs, and approved an attorney's fee totaling \$42,890.60.<sup>1</sup>

On appeal, claimant's counsel challenges the administrative law judge's hourly rate determinations. Employer responds, urging affirmance. Claimant's counsel filed a reply brief.

The United States Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a federal fee-shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). It is well-established that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895. The burden is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *see Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Blum*, 465 U.S. at 896 n.11. As this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the determination as to an appropriate hourly rate is guided by the court's decision in *Shirrod*, which reiterated that, in awarding a fee under the Act, an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT).

---

<sup>1</sup>The administrative law judge's award represents 81.20 hours of attorney time at \$400 per hour, 32.05 hours, 3.6 hours and .3 hours of law clerk time respectively at hourly rates of \$110, \$141, and \$75, plus \$6,355 in costs.

Claimant's counsel contends the administrative law judge unreasonably rejected the entirety of counsel's market rate evidence in favor of hourly rate determinations of other administrative law judges in prior cases. Counsel maintains that because the cases on which the administrative law judge relied, *Martin v. Hawaii Stevedores, Inc.*, 2017-LHC-00418 (Sept. 18, 2017), *aff'd*, BRB Nos. 18-0072/A (Sept. 13, 2018), and *Anderson v. Hawaii Stevedores, Inc.*, 2011-LHC-01015 (Dec. 29, 2016), *aff'd*, BRB No. 17-0281 (Oct. 31, 2017), involved the Honolulu market, they cannot be relevant to the rate analysis in this case in which San Francisco is the relevant community. Counsel asserts that while the administrative law judge acknowledged the difference in the markets, that difference alone nullifies the central reasoning in *Martin*, such that it makes no sense for the administrative law judge to have "found the reasoning persuasive."

Counsel also contends the administrative law judge's rate analysis improperly considered the complexity of the case and California state workers' compensation rates. Counsel maintains that the administrative law judge imported the "legally flawed" logic of the administrative law judge in *Martin*, who counsel states improperly relied exclusively on "complexity" to reject attorney Dupree's declaration. Additionally, counsel avers that the administrative law judge, upon rejecting counsel's evidence in support of a current market rate without explanation, awarded counsel an hourly rate of \$400 based entirely on California State Workers' Compensation Appeals Board (WCAB) memos which showed what an attorney with ten years' experience presumptively could earn for workers' compensation deposition work in 2013. Counsel maintains that use of state workers' compensation rates is inappropriate for determining hourly rates in longshore cases, and the administrative law judge compounded that error by providing no adjustment of the 2013 rates he used to bring those rates current to 2017.

Despite initially stating that he was rejecting counsel's supporting evidence for the reasons espoused in prior administrative law judges' decisions,<sup>2</sup> as we address below, the administrative law judge separately discussed and detailed his reasons for rejecting counsel's supporting evidence in this case. Attorney Fee Order 6-11. Thus, rather than merely adopting the analysis and conclusions of the earlier decisions, the administrative

---

<sup>2</sup>The administrative law judge stated claimant's counsel's exhibits "are identical" to those reviewed and rejected by Judge Larsen in *Martin v. Hawaii Stevedores, Inc.*, 2017-LHC-00418 (Sept. 18, 2017), *aff'd*, BRB Nos. 18-0072/A (Sept. 13, 2018), and have a "striking similarity to many I reviewed in *Carter* [v. *Caleb Brett, LLC*, OALJ No. 2007-LHC-02139]." Attorney Fee Order at 6. The administrative law judge stated that "[f]or the same reasons I rejected the exhibits in *Carter* when setting the market rate for [counsel], and for the same reasons they were rejected by Judge Larsen in *Martin*, I reject them here." *Id.*

law judge provided specific reasons for finding unpersuasive the individual exhibits proffered by counsel in support of his requested hourly rate. We, therefore, reject counsel's contention that the administrative law judge erred by rejecting the entirety of his market rate evidence based solely on findings in prior decisions.<sup>3</sup>

The administrative law judge rejected the Altman-Weil Survey, in part, because it "gives no indication if it considered other important factors such as an attorney's skill, reputation, the quality of representation, and the complexity of the legal work engaged by counsel which must be considered when setting fees." Attorney Fee Order at 10. Although the lack of complexity of the individual case is not a factor in determining an hourly rate, *see Van Skike*, 557 F.3d at 1048, 43 BRBS at 15(CRT), here, the administrative law judge permissibly concluded that the survey did not permit him to conclude that longshore work is "similar" to other types of cases for purposes of establishing a market rate.<sup>4</sup> *See Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT). Moreover, the administrative law judge provided two additional valid reasons for rejecting the Altman-Weil Survey, i.e., it does not distinguish between lawyers or rates by practice area and it is too small of a sample size to constitute an accurate reflection of the market. Consequently, we reject claimant's contention of error.

The administrative law judge awarded counsel a rate of \$400 per hour based on the workers' compensation rates from the WCAB. Attorney Fee Order at 11. We reject counsel's challenges to this finding. In *Shirrod*, the Ninth Circuit, citing the Board's decision in *Christensen v. Stevedoring Services of America*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director*,

---

<sup>3</sup>Moreover, contrary to counsel's assertion, the administrative law judge's decision reflects that he was fully cognizant of the fact that the prior decisions he considered involved the Hawaii market, rather than San Francisco. Attorney Fee Order at 8, 9, 11.

<sup>4</sup>The administrative law judge did not refer to complexity in rejecting much of the other evidence submitted by counsel in support of his requested hourly rate. While the administrative law judge noted that Eric Dupree's supporting statement "appears to be his opinion on the rate regardless of the complexity of the case or the quality of the legal work," Attorney Fee Order at 11, he ultimately rejected Dupree's statement because it "relies upon the California market, as opposed to the specific San Francisco market." *Id.* We note that the general complexity of the issues may be an appropriate element to consider in determining comparability, for example, when comparing longshore litigation to other types of litigation.

*OWCP*, 445 F. App'x 912 (9th Cir. 2011),<sup>5</sup> stated that, unless proven otherwise, reported rates for Oregon state workers' compensation attorneys are not representative of a market rate and cannot be used to determine a proxy market rate for attorneys under the Longshore Act because state workers' compensation rates are generally capped by state law and, thus, are artificially low. *Shirrod*, 809 F.3d at 1092, 49 BRBS at 98-99(CRT).

The evidence from the WCAB does not involve capped workers' compensation rates, nor does counsel allege that such rates are capped. Moreover, it is disingenuous for counsel to offer evidence of rates for deposition work before the WCAB,<sup>6</sup> but then object to the administrative law judge's use of that information to arrive at an hourly rate. In addressing the WCAB memos submitted by counsel, the administrative law judge acknowledged that "[a]lone, they do not suffice to set a market rate," but that "absent more compelling evidence of a market rate, they are instructive as to workers' compensation rates in a general way." Attorney Fee Order at 10. As such, the administrative law judge found "them useful in setting workers' compensation rates as argued by [counsel]."<sup>7</sup> *Id.*

---

<sup>5</sup>In *Christensen*, 44 BRBS at 40, the Board determined that rates reported by Oregon workers' compensation attorneys are not representative of market rates in part because the total fee paid to claimants' attorneys is capped by statute.

<sup>6</sup>Before the administrative law judge, counsel contended "[a]dditional evidence of Market rate is shown in the memoranda from the presiding judges of the State of California Workers' Compensation Appeals Board San Francisco, Oakland and Salinas (Exhibit 3A; Exhibit 4A; Exhibit 5A)." Memo in Support of Fee Petition at 11; *see also* Cl. Reply to Emp. Objections at 8-10. He further stated that "[n]ot much interpretation is needed to justify the assertion that a higher rate [than from these 2013 WCAB memos] may be warranted by significantly more years of experience, the inflationary cost increases in the last 4 years, and additional certified specialties as [counsel] has demonstrated." Memo in Support of Fee Petition at 12. Counsel further conceded that the WCAB memos "apparently are the only official documents yet to be produced that are attempting to establish a market value for any kind of hourly work in the Workers' Compensation expertise in the Northern California Area," such that "it would be hard to understand why it would not be exceedingly relevant evidence supportive of the rate requested in this case." *Id.* Moreover, counsel offered the 2016 declarations of attorneys Baltaxe and Butler that they have been awarded the WCAB rate of \$400 "with some regularity" and have found that such an hourly rate "has not occasioned objection unless there is some extenuating circumstance." CXs 6A, 7A.

<sup>7</sup>The WCAB memos submitted by claimant's counsel relate to employer-paid fees for deposition work in workers' compensation cases and are not contingent fees. Counsel

The administrative law judge, based on the specific evidence in this case, reasonably relied on the 2013 WCAB memos, in conjunction with 2016 statements from at least two of counsel's declarants attesting to receiving such rates in state workers' compensation matters,<sup>8</sup> to set the proxy market rate for counsel's services at \$400 per hour.

The administrative law judge, therefore, thoroughly analyzed the market rate evidence under applicable law and provided a rational basis for his proxy market rate determination. *See Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT); *Christensen*, 44 BRBS at 40. As the \$400 hourly rate awarded for attorney work represents a reasonable determination based, in part, on supporting evidence provided by counsel in a practice area the administrative law judge found relevant, *see Shirrod*, 809 F.3d at 1092, 49 BRBS at 98-99(CRT); *Christensen*, 44 BRBS at 40, claimant's counsel has failed to establish that the administrative law judge abused his discretion in finding that \$400 represents a reasonable market rate.<sup>9</sup> *See* Attorney Fee Order at 52-53; *see generally Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Therefore, we affirm the administrative law judge's finding that counsel's rate is \$400 per hour.<sup>10</sup>

---

has not established that the concerns about capped fees in Oregon are present in this case as it relates to WCAB deposition work.

<sup>8</sup>The administrative law judge credited the 2016 statements of attorneys Baltaxe and Butler that they "routinely receive \$400 per hour in workers' compensation cases before the WCAB." Attorney Fee Order at 10. It should also be noted that the awarded hourly rate of \$400 corresponds with attorney Bull's statement that counsel "should earn a rate higher than the \$250 to \$350 per hour range." *Id.* at 11.

<sup>9</sup>The administrative law judge did not consider the fee award of the United States Court of Appeals for the Ninth Circuit in *SSA Marine v. Lopez*, Case No. 08-72267 (9th Cir. Dec. 2, 2011), cited by counsel because counsel did not supply a copy and the administrative law judge could not locate the order. Counsel's contention on appeal that the administrative law judge could have looked the case up on PACER simply misses the mark, as it is counsel's burden to adequately document his fee petition.

<sup>10</sup>Counsel contends that use of the 2013 WCAB rate of \$400 is insufficient because it does not reflect the current value of those rates. The work performed by counsel in this case occurred between February 22, 2016, and May 1, 2017. The administrative law judge's award, though based on the 2013 WCAB rate, also is based on the 2016 declarations of attorneys Baltaxe and Butler that they have been awarded a \$400 hourly rate "with some regularity." Moreover, counsel did not seek a delay enhancement, nor do the facts in this case establish there was "extraordinary delay" such that he would be

Claimant's counsel also challenges the administrative law judge's hourly rate awards for law clerk services because: 1) the award of an hourly rate of \$110 for the services of law clerk Alioto without any explanation violates the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A); 2) the award of an hourly rate of \$75 for the services of law clerk Dunn is based solely on Honolulu-based rates; and 3) the denial of any fee for the services of law clerk Briggs was unreasonably punitive given that the proper remedy for an incomplete fee request is to defer the fee award until a complete statement is provided.

The administrative law judge, noting the dearth of evidence in support of the requested hourly rates for Alioto and Dunn, used prior awards as a starting point from which to calculate their hourly rates. For Alioto, the administrative law judge relied, in part, on the hourly rate he found appropriate for law clerk Birnbaum of \$141,<sup>11</sup> but reduced that figure to \$110 per hour due to Alioto's "limited time as a paralegal." *See* Attorney Fee Order at 12. Accordingly, the administrative law judge provided a sufficient explanation for the hourly rate of \$110 awarded for Alioto's work.

With regard to Dunn, the administrative law judge stated that because there "was absolutely no evidence about her background, training or experience," Attorney Fee Order at 12, he would defer to the hourly rate she received in prior cases arising under the Act. As for Briggs, the administrative law judge stated "[t]here was similarly no information related to background, training or experience." *Id.* Given this, and the lack of any prior cases involving an awarded hourly rate which could be referenced, the administrative law judge concluded that "Mr. Briggs is not entitled to a fee for his limited work in this matter." *Id.* The administrative law judge thus denied a fee for Briggs's two hours of work.

We affirm the administrative law judge's findings in this regard. Absent any prevailing rate evidence for, or information on the background, training and experience of, law clerks Dunn and Briggs, the administrative law judge permissibly found that \$75 is a reasonable hourly rate for Dunn<sup>12</sup> and that counsel is not entitled to a fee for Briggs's

---

entitled to a fee enhancement as a matter of law. *See Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) (two-year delay not extraordinary; no enhancement); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996) (Ninth Circuit ordered a fee enhancement as a result of a 14-year delay).

<sup>11</sup>The hourly rate of \$141 awarded to law clerk Birnbaum is affirmed as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

<sup>12</sup>While it would appear that the \$75 hourly rate awarded by the administrative law judge for work by law clerk Dunn is based on the Hawaiian market, it is counsel's burden

work. Although the administrative law judge could have entered a higher award for Dunn and an award for Briggs, claimant's counsel has not demonstrated that the administrative law judge's decisions amount to an abuse of his discretion.<sup>13</sup> Therefore, we affirm the hourly rate determinations for counsel's law clerks.

---

to present satisfactory evidence that the requested rate is in line with the prevailing San Francisco market, a burden which the administrative law judge found counsel did not meet in this case. *See generally Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010).

<sup>13</sup>20 C.F.R. §702.132(a), in part, states:

The application shall be supported by a complete statement of the extent and character of the necessary work done, ***described with particularity as to the professional status (e.g., attorney, paralegal, law clerk, or other person assisting an attorney) of each person performing such work, the normal billing rate for each such person***, and the hours devoted by each such person to each category of work.

(emphasis added). We reject counsel's contention that the administrative law judge should have reopened the record for submission of information in support of the fee request for Briggs's work. Employer objected on the ground that counsel "has provided no evidence of the qualifications for two of the clerks, Samuel Briggs and Katie Dunn, so fees sought by those two timekeepers should be denied." Emp. Objections at 12. Counsel was on notice regarding these possible deficiencies, but did not address this specific objection in his reply brief. *See generally Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013).



Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

JUDITH S. BOGGS  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge